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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IDENTITY ARTS, LLC,

Plaintiff - Appellant,

v.

BEST BUY ENTERPRISE SERVICE,
INC., a Minnesota corporation,

Defendant - Appellee.

No. 07-16648

D.C. No. CV-05-04656-PJH

MEMORANDUM^{*}

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Argued and Submitted March 10, 2009
San Francisco, California

Before: KOZINSKI, Chief Judge, HUG and BEA, Circuit Judges.

The district court did not err by granting Best Buy's motion for judgment on the pleadings. The cell phone courtesy messages at issue are not substantially similar as a matter of law because Best Buy copied only Identity Arts's idea, not its

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

protectable expression. *See* 17 U.S.C. § 102(b); *Funky Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006).

Moreover, the license agreement between the parties expressly permits Best Buy to make its own cell phone courtesy messages styled as faux movie trailers. *Cf. S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1088 (9th Cir. 1989). Finally, Identity Arts is judicially estopped from contending that its courtesy message tells the story of a faux movie trailer interrupted by an off-screen cell phone's ring, because this position is clearly inconsistent with Identity Arts's position in the case consolidated with the instant case before the district court, in which Identity Arts characterized its courtesy message as telling the story of a submarine mission requiring silence. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001).

AFFIRMED.